IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

LOUISIANA TRAILER SALES, INC.,
Petitioner,

versus

GEORGE P. SCHULTZ, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The judgment of the United States Fifth Circuit Court of Appeals is included herein as Appendix A. The opinion by the United States Court of Appeals, Fifth Circuit, is included herein as Appendix B. A petition for rehearing was denied without opinion, Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 22, 1970, No. 27,956. The petition for rehearing was denied July 16, 1970. Appendices B, C.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

As stated in the opinion below:

"The sole question for determination in this matter involving a statutory interpretation is whether the overtime exemption provisions of Section 13(b), (10) of the Fair Labor Standards Act, 29 U.S.C. § 213(b) (10) (1966), are applicable to five employees of appellee Louisiana Trailer Sales, Inc., known as 'servicemen' and 'service-mechanics.' The District Court found the employees to be within the overtime exemption provisions of the Act."

STATUTE INVOLVED

Section 13(b) (10) of the Fair Labor Standards Act, 29 U.S.C. 213(b) (10) 1966 exempts:

> "'Any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements or aircraft, if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.'"

STATEMENT OF FACTS

All pertinent facts have been stipulated.

Petitioner is a nonmanufacturing concern engaged in the sale of new and used trailers of mobile homes. All parties have stipulated that the word "trailer" as used in the subsection, and herein, includes "mobile homes".

The only question is whether the "servicemen" and "service-mechanics" employed by petitioner are excluded from Fair Labor Standards requirements by the statutory exemption of "mechanics". The remainder of this Statement of Facts is quoted from the Fifth Circuit Opinion, Appendix B.

"The duties of the servicemen in question are detailed in the stipulation to include:

'A. Checking the interior and exterior of mobile homes and trailers received from manufacturers for any defects in workmanship or damages and repairing same.

'B. Checking, servicing, repairing and replacing parts in appliances, the plumbing, electrical air conditioning, structural and butane gas systems in mobile homes and trailers, both before and after delivery to customers.

'C. Connecting up the plumbing, air conditioning, electrical, sewer and gas systems to water, electric, gas and sewer lines at the customer's site.

'D. Delivering mobile homes and trailers from defendant's establishment to the customer's site.

'E. Constructing concrete block foundations for installation of mobile homes and trailers at customer's site.

'F. Placing and servicing mobile homes and trailers on foundations at customer's sites.

'G. Performing carpentry work inside mobile homes and trailers, e.g., freeing up or replacing wooden doors, door frames, window frames, flooring, paneling or partitions.

'H. Repairing any leaks resulting from openings in the hulls of mobile homes and trailers, or leaks in roof during warranty period, to-wit, one year after delivery.

'I. Painting the interior and exterior of mobile homes and trailers (primarily used trailers).

'J. Repairing or replacing tile in the bathrooms, kitchens or showers of mobile homes and trailers.

'K. Repairing and/or replacing exterior aluminum panels or other portions of mobile homes and trailers

or appliances which may be damaged in transit or during installation at the customer's site.

'L. When circumstances required it, these employees checked, serviced or repaired the running mechanisms of the mobile homes and trailers such as wheels, axles, brakes and signal lights but these functions were occasional and did not require any substantial amount of employee time.'

The Secretary contends that the term 'mechanic' should be restricted to employees performing those services which are ordinarily performed in the automotive industry; for example, checking wheels, axles, brakes and signal lights, and in transporting these homes for delivery. The Secretary readily admits that the servicemen perform these functions but argues that the bulk of their duties consists of converting the mobile homes into permanent residences and in servicing and maintaining them thereafter and that they are not therefore 'mechanics' servicing 'trailers' within the intendment of the exemption."

INTRODUCTION

Men should work reasonable hours for a living wage. For one hundred and sixty-two years it may be assumed that thinking people of the United States believed this to be true, but history assures us that they did not believe that Congress could or should make it happen.

For it was 1938 before Congress with obvious trepidation and misgivings experimented only slightly with our free enterprise system of government when they first passed a Fair Labor Standards Act.[1] Congress experimented because the 1938 Act covered only a very select group of rich employers who were obligated not too onerously to pay their employees a minimum wage of twenty-five cents an hour for a forty-four hour week with no overtime allowances. From that date to this the evolution of Fair Labor Standards has been a painful and deliberate process. It is a history of strife and compromise between the two most politically powerful elements in this country.

Because of the prestige of the contestants, the periodic conflicts were widely debated and publicized. Top flight congressional committees scrutinized, argued, debated and weighed every word of each proposed amendment — and there were thousands. Labor in these thirty-two years has gained many advantages. The minimum wage has grown to $1.60 an hour and the work week has been shortened to forty hours.[2] Labor has gained other advantages, as overtime allowances and fringe benefits, but their victory is far from complete, for today less than fifty per cent of the labor force is covered by Fair Labor Standards.

Thirty-two years of Fair Labor Standards history prove that each amendment to the basic law increased

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[1] 52 Stat. 1060.
[2] 80 Stat. 830, 29 U.S.C. 201.

its coverage. Amendment after amendment placed more and more employees under the protection of the Act. Traditionally and legally Congress and only Congress extended the coverage of this Act to additional workers. There remains no constitutional challenge to the right of Congress to regulate wages and hours — but no one, and no Court should have the right to extend or limit the Congressional definition of the coverage of Fair Labor Standards.

It is the attempt of the Secretary of Labor to extend the coverage that petitioner here challenges. More particularly petitioner challenges the Secretary on the method of approach, that is to the Courts rather than to the Congress.

The array of attorneys, amicus curiae, the records, statistics and documentation herein noted all proclaim the truth of a plot with considerably more implication that the effort of a benevolent administration to collect a paltry $752.33 in wages for five supposedly oppressed workers.

This is the battle of "GUIDE LINES". Petitioners believe that Fair Labor Standards can be set only by Congress. The Secretary of Labor believes that the device of administrative interpretation of Fair Standards can control labor by administrative edicts commonly known as "GUIDE LINES".

WHERE THE MEANING IS CLEAR

Once more petitioner notes that the only question of law specifically raised is whether the mechanic-employees of petitioner are covered by the Fair Labor Standards, or are they exempt by the section thereof that excludes:

> "'Any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements or aircraft, if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.'"[3]

The written word is used to communicate the law of the land — and the meaning is clear. No one who comprehends the written word can say that this law means some "mechanics" and not other mechanics. As elementary is the law of judicial interpretation to the effect that all of the rules are suspended when the meaning of the statute is clear.

The above is dogma, and not the dogma of petitioner. It is the word from the Supreme Court of this land. The Secretary cannot be unaware of this any more than he can be unaware that other federal courts have specifically made this law applicable to Fair Labor Standards. Yes, and even to the very subsection that is here involved.[4]

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[3]Section 13(b) (10), 29 U.S.C. 213 (b) (10) 1966.
[4]*Allesandro v. C. F. Smith Company*, 136 F.2d 75, 1943.

in excess of the needs and desires of the populace. Trailer homes became larger and more sophisticated in concept. The gypsy image of the trailer dweller was transformed by astute public relations into the "Mobile Home" dweller. Then trailer home industry flourished and more and more workers were employed in all of the industrial processes that are required to turn raw material into a product for delivery to the ultimate customer.

All phases of this industry were scrutinized by the Secretary. The production of the raw material was from the beginning within the gamit of Fair Labor Standards. The manufacture of trailers was always considered within the jurisdiction of the Secretary and the Act. The selling function with autos had always been excluded from the Fair Labor Standards. The reasons are abundantly apparent. Without sales there would be no industry, and sales and salesmanship is not a matter that turns on and off by the operation of a time clock.

At first all personnel connected with the vital selling facet of automotive industry were exempt from Fair Labor restrictions. This included all sales, service and clerical personnel.[5] But as automotive business grew so did credit financing and as a consequence so did the clerical forces. Finance and bank personnel became indistinguishable and hence the inevitable — the clerical forces of the franchise dealers were placed

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[5] 29 U.S.C. 213(a) exempted "Any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks or farm implements.".

under Fair Labor Standards BY AN ACT OF CONGRESS.[6]

At the same time Congress designated other industries that would be included under the very same law that they had so carefully evolved. Thus in 1966 Congress deigned that the trailer industry would be accorded equal protection of the Fair Labor laws — the Fifth Circuit Court of Appeals without intimation of unconstitutionality has deigned differently.

Petitioner can comprehend the lessons of history and envision the day when the service forces of the franchise dealer may be a significant segment of the labor community almost unrelated to the selling facet and consequently they will become fair game for the Secretary — if Congress places them under the Act.

This evolutionary process of extending the coverage of Fair Labor Standards to ever increasing numbers of workers has satisfied the American public, and all citizens point with pride to the status of American labor.

Then on September 4, 1968, the Secretary of Labor apparently decided that the evolution of Fair Labor Standards by legislative processes was too slow. This impatience is evident from the "Guide Line" directive of that date which defines the term "mechanic".[7] It

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[6]Section 13(b) (10), 29 U.S.C. 213(b) (10) 1966.

[7]"... the following types of work do not qualify an employee as a 'mechanic' for purposes of Section 13(b) (10) even though performed on an automobile, trailer, farm implement, or air-

is the position of petitioner that it is of no moment what that definition is, for Congress exempted from Fair Labor Standards.

> "'Any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements or aircraft, if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.'"

The term mechanic is generic and includes all mechanics, any definition of the term would be limiting and the result would be more workers would be placed on Fair Labor Standards.

This September edict of the Secretary of Labor is justified by a brilliant legal staff on the dual basis (1) That Congress did not intend the word "mechanics" to mean "all" mechanics, and (2) Because of the now hybrid nature of the mobile home industry.

Both premises are entirely baseless, for the legislative intent is of no consequence "where the meaning of the statute is clear".[8] But let us say the legislative

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craft: washing; cleaning; lubricating; painting; carpentry; blocking; checking, servicing, or repairing the plumbing, electrical and gas systems, the doors, windows and other structural features of mobile home trailers (as opposed to the running mechanisms, such as wheels, axles, brakes, hitches, and signal lights)."

[8] *Hadden v. Collector*, 72 U.S. 107 1866; *Merritt v. Walsh*, 104 U.S. 694, 1881: *United States v. Shreveport Grain and Elevator Company*, 287 U.S. 77, 1932; *Caminetti v. United States*, 242 U.S. 470, 1916.

intent is needed to find out whether or not the word "mechanics" means "all mechanics" then no better source of legislative intent could be found than that of the person who supplied this intent. The author of the Act, Congressman Roman C. Pucinski of Illinois, unequivocally states that the interpretation of the Secretary is "ALL WET". In a classic letter to the Department of Labor the author of this bill had this fair comment on the September edict:

"Mr. Clarence Lundquist
Administrator
Wage and Hour and Public
Contracts Divisions
U.S. Department of Labor
Washington, D. C.

Dear Clarence:

Permit me to tell you how bitterly disappointed I am in your ruling of September 4th regarding exemption of mechanics and servicemen employed by mobile home dealers.

At the time this matter came up I had considerable discussions with you and your people and there can be no doubt in your mind and I wanted to exempt all mechanics and servicemen employed by mobile home dealers from the Act. I drew no distinction between one type of employee and another. You know this. Your people know this.

You know we intended to exempt *all* with no exception. It is quite obvious to me that legislative intent no longer has any meaning to those in the Executive Branch.

I can tell you that as a result of this experience, when your agency comes before my Committee next time we're going to spell out exactly and precisely the law and we will specifically bar any guidelines. I've had my fill of guidelines written by administrators who legislate without ever going before the voter.

If you fellows want to write the laws, why don't you run for office and when elected you can write them. You people with your guidelines that have no similarity to what the legislative intended give credence to George Wallace's claim that we now have government by guidelines, not by the people's representative.

I suggest that you take another look at your letter of September 4 and rewrite those guidelines to comply with legislative intent. Since I was the author of the amendment, I can assure you that your present determination is all wet.

Sincerely yours,

Roman C. Pucinski
Member of Congress"[9]

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[9]Brief Amicus Curiae, Mobile Housing Association of America, Incorporated, at page 39.

The above and foregoing should lay at rest for all time the matter of legislative intent. Petitioner does not believe that it should have been disinterred — but jurisdictional grabs are a characteristic of the traditional labor — industry — government strife.

As to the second basis for the September edict, that is the metamorphosis of the trailer mechanic into a construction worker because the Secretary says it is so, petitioner needs do no more than to point to history, the houses of Congress and the most basic of constitutional concepts — the separation of power — and be ever grateful that the lawmaking power still resides in the Congress of the United States.

The irrefutable logic of the above did not stop the Secretary of Labor from attempting to get judicial sanction of his power grab. Two Court proceedings were initiated.[10] At the district level the Secretary was found to be only half right. One Court overwhelmed with statistical data as to the growing force of workers unprotected by Fair Labor Standards, held that "mechanics" meant something less than all mechanics. Then in this case the district court refused to be awed by the same material and held that "mechanics" meant all mechanics. Congress had not seen fit to categorize "mechanics" and the district court properly aware of its judicial authority likewise refused to place some mechanics and not others under the Fair Labor Standards.

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[10]The instant case and *Snell v. Quality Home Brokers, Incorporated*, 4 C.A. 1970 #13613, April 6, 1970.

The Fifth Circuit Court of Appeals from where this complaint arises, reversed the district court and said that "mechanic" had a "vehicular connotation and is suggestive of automotive units".[1] So now at the circuit level petitioner finds a precedent the equivalent of a congressional enactment which he believes the Court had no authority to enact. In so doing petitioner notes other constitutional objection — the equal protection of the laws as to automobile and trailer mechanics.

THE ORIGIN OF ERROR AND THE HYPHEN HIATUS

Error may start innocently or deliberately and error once started by either design or accident mushrooms in startling proportions. Petitioner seeks not to alarm by hypothetical catastrophes of the possible consequences of the Fifth Circuit opinion, but simply suggests the origin of the error that may lead to consequences of some magnitude. The error petitioner suggests, is not the semantics of the word "mechanic" but, is the failure to consider the word "selling". Selling and all of its related facets is in law and in logic unregulatable by Fair Labor Standards of work hours. The law itself has always recognized this, and so did the Courts — until this Fifth Circuit Opinion.

The original Fair Labor Standards act excluded from its coverage all automotive personnel engaged in selling. The automobile selling force was then, and is now exempt from the provisions of the act. In 1966 the automotive sales force was again exempted from the coverage of the act, but this time the coverage was

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[1]Appendix B.

spelled out. The act exempted the salesman, partsman and mechanic. Then the various lobbies added the trailer, the airplane and the farm implements to the very same act. This simply meant that the trailer, airplane and farm industries were to be given the same treatment as were the auto workers.

The rationale of the exemption of the selling force was logical when first made, and is logical today. Unless the product is sold there is no industry. Congress certainly knew that selling is not limited to regular working hours, or is it accomplished only by salesmen.[12]

Parenthetically it is here noted that even though the Fair Labor Standards Act does not define a salesman as one who works on a commission, petitioner notes certain overtones in this and other opinions to the effect that the sales force are not limited to the forty hour week because they work on commission, and that a commission based wage is the test for those personnel who would be exempt from Fair Labor Standards hour restriction. Whereas petitioner does not subscribe to this criteria, it makes no difference whatsoever, for Congress and more particularly Congressman Roosevelt in committee hearing made it perfectly clear for the enactors of this law that it was an industry wide practice of franchise auto and trailer dealers to

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[12] *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948). A statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.

pay the mechanics half of the labor charges on each job.[13]

The point that petitioner would make is that the mechanic in preparing a trailer home for sale is in fact participating in that sale. A mechanic in making a trailer home suitable to individual tastes, and operable, is performing a selling function — and it is selling activity that is exempted from coverage by the Act.

And, here is where petitioner believes error began. Maintenance of the trailer after delivery certainly seems to be a function beyond the exempted realm of sales. Petitioner agrees, and suggests that error began when the Circuit Court failed to recognize that sales are consummated because of many inducements offered by the seller. Not the least of these inducements is warranty. This warranty requires the service of the trailer mechanic DURING THE WARRANTY PERIOD and no longer. The repair and replacement of parts of a trailer during this warranty period is but another facet of the sale. Without warranty there would be very few sales of trailer homes.

To demonstrate that "selling" is the key word in this statutory exemption it is noted that it is repeated twice in the statutory exemption that states:

> "'Any salesman, partsman, or mechanic primarily engaged in *SELLING* or servicing automobiles, trailers, trucks, farm implements or

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[13]House Committee on Education and Labor hearing, Minimum Wage Hour Amendments, 1965.

> aircraft, if employed by a nonmanufacturing establishment primarily engaged in the business of *SELLING* such vehicles to ultimate purchasers.'"

In this and other cases, and particularly in the brief of various counsel, the problem is oversimplification. With hyphens or asterisks the statute is abbreviated and the problem is stated thus: Is the questioned worker a

> "MECHANIC PRIMARILY ENGAGED — IN SERVICING — TRAILERS."

The hyphen hiatus and the misinterpretation of the statute follows in understandable sequence.

Petitioner believes that "servicing" is a word with comprehension enough to encompass just about anything any mechanic could do to a trailer home in order to make it more desirable, livable, serviceable, et cetera. But for the moment replace the hyphens with a statutory "in selling or" and then suppose a potential buyer of a trailer home was completely satisfied with the product but for the color, then suppose the trailer mechanic repainted the trailer home and sold a trailer home. Is he exempt from the Fair Labor Standards requirements. Petitioner believes that Congress has so decreed, and absent a constitutional fault, what Congress has decreed no Court, including the Fifth Circuit Court of Appeals, should put asunder, modify, repeal, abrogate or interpret out of existence.

Constitutionally petitioner by the opinion complained of is being deprived of the equal protection of the law granted to his fellow artisan in the automobile industry because of the attempted usurpation of legislative authority by the Secretary of Labor, which usurpation now has the seal of approval of the Fifth Circuit Court of Appeals — and from this we appeal.

CONCLUSION

The automotive franchise dealer has always been excluded from the minimum wage-hour provisions of the Fair Labor Standards. The changing nature of the franchise operation necessitated the specification of excluded personnel, i.e., salesman, partsman and mechanic. All automotive mechanics regardless of duties are excluded from coverage by the Act. A 1966 amendment gave the trailer industry the same exemption as the automotive industry. The opinion of the Fifth Circuit Court of Appeals has denied this exclusion to trailer mechanics and in so doing they have denied trailer mechanics the equal protection of our laws.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon counsel for plaintiff, Laurence H. Silberman, Solicitor of Labor, at his office, United States Department of Labor, Washington, D.C. 20210, by placing same in the U.S. Mail, postage prepaid, this ____ day of August, 1970.

GUY JOHNSON

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27956

D. C. Docket No. CA 67-2 "C"

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

versus

LOUISIANA TRAILER SALES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for whatever wage adjustments are necessary in order to conform with the opinion of this Court.

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 22, 1970

Issued as Mandate: Jul. 24, 1970

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27956

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appella

versus

LOUISIANA TRAILER SALES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 22, 1970)

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: The sole question for determination in this matter involving a statutory interpretation is whether the overtime exemption provisions of Section 13(b) (10) of the Fair Labor Standards Act, 29 U.S.C. § 213(b) (10) (1966), are applicable to five employees of appellee Louisiana Trailer Sales, Inc., known as "servicemen" and "service-mechanics." The District Court found the employees to be within the overtime exemption provisions of the Act. We disagree for reasons which follow.

Section 13(b) (10) of the Act exempts from overtime coverage

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers."

The pertinent facts have been stipulated. Appellee, a nonmanufacturing concern, is engaged in the sale of new and used house trailers or mobile homes. The parties further stipulated that the word "trailer" as used in the Act includes mobile homes. The hybrid nature of a mobile home, however — as a vehicle when moving from place to place, and as a residence when permanently mounted on a stationary base — has engendered much of this controversy in determining the intent of the Legislature in excluding trailers from the Act's coverage. In order to come within the exemption provisions of the Act, the servicemen must meet three essential requirements. They must be (1) *mechanics*, (2) who are *primarily* engaged in (3) servicing *trailers:* It is not disputed that the term "primarily engaged" as used in the Act contemplates in excess of fifty per cent of the employees' hours of work.[1] The duties of the servicemen in question are detailed in the stipulation to include:

"A. Checking the interior and exterior of mobile homes and trailers received from manufacturers for any defects in workmanship or damages and repairing same.

"B. Checking, servicing, repairing and replacing parts in appliances, the plumbing, electrical air conditioning, structural and butane gas systems in mobile homes and trailers both before and after delivery to customers.

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[1]See 91 Wage and Hour Manual, pp. 931, 935-937.

"C. Connecting up the plumbing, air conditioning, electrical, sewer and gas systems to water, electric, gas and sewer lines at the customer's site after delivery.

"D. Delivering mobile homes and trailers from defendant's establishment to the customer's site.

"E. Constructing concrete block foundations for installation of mobile homes and trailers at customer's site.

"F. Placing and servicing mobile homes and trailers on foundations at customer's sites.

"G. Performing carpentry work inside mobile homes and trailers, e. g., freeing up or replacing wooden doors, door frames, window frames, flooring, paneling or partitions.

"H. Repairing any leaks resulting from openings in the hulls of mobile homes and trailers, or leaks in roof during warranty period, to-wit, one year after delivery.

"I. Painting the interior and exterior of mobile homes and trailers (primarily used trailers).

"J. Repairing or replacing tile in the bathrooms, kitchens or showers of mobile homes and trailers.

"K. Repairing and/or replacing exterior aluminum panels or other portions of mobile homes and trailers

or appliances which may be damaged in transit or during installation at the customer's site.

"L. When circumstances required it, these employees checked, serviced or repaired the running mechanisms of the mobile homes and trailers such as wheels, axles, brakes and signal lights but these functions were occasional and did not require any substantial amount of employee time."

The Secretary contends that the term "mechanic" should be restricted to employees performing those services which are ordinarily performed in the automotive industry; for example, checking wheels, axles, brakes and signal lights, and in transporting these homes for delivery.[2] The Secretary readily admits that

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[2]The following excerpt from an opinion signed by Wage and Hour Administrator Clarence T. Lundquist, January 4, 1968, 91 Wage and Hour Manual, p. 935, exemplifies the position taken by the Secretary:

> "As used in section 13(b) (10) with respect to trailers the term 'mechanic' describes an employee whose primary duty (i.e., more than 50 percent of his work time) is spent performing mechanical work on trailers to place them in proper operating condition by repairing and servicing their running mechanisms, such as wheels, axles, brakes, hitches, and signal lights. Thus, those employees who are engaged in checking the plumbing, electrical and butane gas systems, the doors, windows and other structural features of the trailer to make certain that they are in working order, would not be included in the exemption. This interpretation is based on the premise that the exemption was intended to apply to mechanics but not to servicemen who perform the same type of duties as the thousands of individuals who service household appliances and make home repairs."

the servicemen perform these functions but argues that the bulk of their duties consists of converting the mobile homes into permanent residences and in servicing and maintaining them thereafter and that they are not therefore "mechanics" servicing "trailers" within the intendment of the exemption.

The question admittedly is a close one because of ambiguities in the Act which are not resolved by statutory definition. The statute defines neither "mechanic" nor "trailer" and our resort to dictionaries produces only further ambiguities because of the various shades of meaning ascribed to both terms. The only light shed on the term "mechanic" is contained in the following language of House Report No. 1366, 89th Cong., 2d Sess., 1966, pp. 42-43:

> "The term 'mechanic' is intended to include all employees doing mechanical work, such as get-ready mechanics, automobile, truck, farm implement, or aircraft mechanics, body or fender mechanics, used car reconditioning mechanics and wrecker mechanics."

The definition, containing as it does a variant of the term defined, is not too helpful. However, the illustrative grouping of words following the definition has a vehicular connotation and is suggestive of automotive units.[3] The definition of "mechanic" was submitted

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[3]The retention by the Committee of the term "farm implements" in the overtime exemption, although not compelling an inference that the implements are considered vehicular and mechanical in the sense of having moving parts, does not pre-

by the House prior to the addition of the term "trailer" to the exemption provisions of Section 13(b) of the Act. The reasonable conclusion is that at that time at least there was no consideration of the applicability of the term "mechanic" to the mobile home industry, whose servicemen admittedly perform myriad diversified functions not usually associated with vehicles or performed by mechanics, ranging in nature from the installation of plumbing to constructing concrete block foundations for installation at building sites. Thereafter the legislative history is silent to any relating back of the term "trailer" to the term "mechanic." It is also noteworthy that in the Hearings before the House Labor Subcommittee during the first session of the 89th Congress, the mobile home industry's emphasis centered on obtaining the overtime exemption for its salesmen, not mechanics.[4]

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clude such an inference. More significantly, however, is the relation of farm implements to employment in agriculture, a field which has historically enjoyed both the overtime and minimum wage exemptions. See 29 U.S.C. § 213(a) (1938).

[4]Hearings before the House Labor Subcommittee, H. R. 8259, 89th Cong., 1st Sess., 1965, 657-660.

An amendment was proposed which would have exempted from the Act's overtime provisions "any employee employed as a salesman or serviceman by the establishment primarily engaged in selling mobile homes, travel, trailers or camping trailers." The amendment was rejected, and as finally enacted the amendment contained the word "trailers" in lieu of the three suggested. It is not clear from the legislative history whether the substituted term was intended as a restriction or as an expansion to cover similar structures under one heading. However, the remarks of the committee chairman, Congressman Roosevelt, following the proposed amendment and an explanation by its advocate, suggest his rejection of exemption coverage for repairmen servicing any permanently land-based unit. Hearings before the House Labor Subcommittee on H. R. 8259, 89th Cong., 1st Sess., 1965, p. 659.

As previously noted, the term "trailer" is not defined in the statute. The Act includes the term with the same series of words — automobiles, trucks and farm implements — contained in the House Report definition of "mechanic." The Act specifically refers back to the series as "such vehicles."[5] The only sense in which the word "vehicle" could reasonably have been intended is that connoting a moving conveyance or means of transportation.[6]

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[5]To the same effect see H. Conf. Rep. 2004, 89th Cong., 2d Sess., September 6, 1966, United States Code Congressional and Administrative News, p. 3049.

[6]A report made by the Federal Home Loan Bank Board, Washington, D. C., dated May 1969, entitled "A Study of The Mobile Home Industry," demonstrates the variance between the mobile home and the ordinary travel trailer:

> "It is necessary to distinguish between a mobile home and a travel trailer. A mobile home has been defined as a movable or portable dwelling constructed to be towed on its own chassis, connected to utilities, and designed without a permanent foundation for year-round living. It can consist of one or more units that can be folded, collapsed or telescoped when towed and expanded later for additional cubic capacity, or of two or more units, separately towable but designed to be joined into one integral unit, capable of being again separated into the components for repeated towing. A mobile home is at least 29 feet in length and 10 feet in width. Mobile homes are towed to their sites by trucks whose movements are controlled by state highway regulations, or they are shipped on railroad flat cars.
>
> "On the other hand, a travel trailer is a portable structure built on a chassis and designed for temporary use. It is used for travel, recreation, and vacation purposes. Most manufacturers label their units 'recreational vehicle' in order to distinguish them from mobile homes. A recreational vehicle is also distinguishable by its size which may be no more than 8 feet wide and 32 feet long. These units may be towed by an automobile. . . .

"The distinguishing feature between a mobile home and travel trailer seems to be that one is built for permanent occupation while the other is intended to be occupied purely on a temporary basis." (P. 4.)

The Study further depicts the mobile home as an answer to the housing shortage and the growing economic needs of our country. The introduction to the Study furnishes the keynote to its contents:

"Housing for low and moderate income families is the most urgent shelter need of the Nation today. Both our industry and the Board has a mandate to do all it can to increase the supply of housing to this important segment of our ever growing population."

The following excerpts from the Study further substantiate the role played by the mobile home and the success enjoyed by the industry in supplanting the needs furnished by the conventional house-building industry:

"'. . . In 1965 there were 965,000 single family housing starts. In contrast, preliminary figures indicate that there were 794,000 single family housing starts during 1966. This represents almost a 20% decline in conventional housing starts.

"'The mobile home industry benefited to a certain extent from the housing shortage due to the effect of tight money on housing starts. . . .

"'In 1947 factory produced homes of all kinds accounted for 12% of the housing mix. By 1967, nearly a whopping 40% of single family homes were factory produced: mobile factories built 20% of all these homes and your "pre-fab' competitors built the same amount.'

. . . .

"As further evidence of prospective growth, Standard and Poor's 'The Outlook' of March 18, 1968, reported the 1967 production at 244,000 units, or 11% more than 1966. 'The Outlook' continued with the following general forecast: 'Industry leaders predict shipments of 400,000 units by 1972, pointing out that population trends favor continued growth. . . .'

. . . .

". . . The industry seems to have followed a cyclical pattern with the economy rather than the contracyclical pattern followed by conventional home building. The boom in mobile homes has been the greatest dur-

A statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. *Shapiro v. United States*, 335 U. S. 1, 31 68 S.

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ing periods in which conventional housing starts were at their lowest ebb.

"... Like the conventional home builder, a mobile home manufacturer needs only a little capital to begin production. This keeps him in and out of the business in a pattern similar to the national economy. His influence is readily felt in the industry and he competes vigorously with large firms for a share of the local market.

....

"... [The mobile home industry] has all of the indicators of a sound industry, and its impact will no doubt be felt in the housing market for many years. ..." (P. 8, 9, 10.)

....

"It appears that the market for mobile homes speaks for itself without further study. The following general statements are made in summary:

"For the present there are more than five million people who live in mobile homes. This figure includes third generation mobile home dwellers. Indications point to a continued rapid growth in sales. The younger and older segments of our population are increasing rapidly and should continue to find this type of housing desirable. The demand will also be stimulated by the growing number of families purchasing second homes.

"For the immediate future, in addition to the anticipated demand increase mentioned above, we can reasonably expect added use of mobile homes in retirement centers and garden apartments. Government subsidized, low-income housing will make effective use of mobile homes.

"For the long range future, we can anticipate use of mobile homes as yet untried or even heard of. These will include luxury type mobile homes and parks and high rise apartment complexes." (P. 13.)

[illegible] 1961 (1948). To construe the word "mechanic" in conjunction with the word "trailer" as including the part-time house-repair, truck driver, and construction duties performed by these servicemen, is to frustrate the legislative intention and to extend the exemption beyond that which in our opinion was intended by Congress. Our appreciation of the overall purpose of the Fair Labor Standards Act to improve generally the conditions of workers,[6] along with our analysis of the 1949 amendment, causes us to conclude that Section 13(a)(10) was not intended to be interpreted in the broad sense found by the District Court.

[illegible]

[illegible]

[illegible]

Section 13(a) (19),[9] the forerunner of Section 13(b) (10), provided all employees of automobile, truck and farm implement dealers a complete exemption from both the minimum wage and overtime provisions of the Act. In 1966 when the Act was amended to include the present Section 13(b) (10), the provisions of the amendment, while broadening the exemption coverage to the aircraft and trailer industries, had an overall limiting effect. It not only narrowed the group of employees to be exempted to salesmen, partsmen and mechanics, but excluded the former minimum wage exemption applicable to this category of employees. It is apparent that the addition of the aircraft and trailer industries to the exemption was a recognition of certain disadvantages suffered by industries which were comparable to the automotive industries already enjoying the exemption.

The Fourth Circuit very recently had occasion to interpret 29 U.S.C. § 213(b) (10) in the case of *D. W. Snell v. Quality Mobile Home Brokers, Inc., d b a A to Z Mobile Homes*, 4 Cir., 1970, ___ F. 2d ___ [No. 13613, April 6, 1970], under circumstances similar to those in the instant matter. In *Snell* the Court affirmed the District Court's decision in favor of an employee who sought to recover unpaid overtime wages and liquidated damages from his employer under the Fair Labor Standards Act. The Fourth Circuit rejected the argument of the employer that Snell was exempt from the overtime provisions of the Act because he was a mechanic primarily engaged in servicing trailers

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[9] 29 U.S.C. § 213(a) (19) (1964).

within the meaning of the exemption amendment and held:

> "[I]t is apparent from [the Act's] language and from the legislative history that Congress did not intend to exempt an employee who was primarily engaged in truck driving, construction work, or servicing appliances. Prior to 1966, the Act exempted all employees of automobile, truck, and farm implement dealers. The 1966 exemption named only three specific classes of employees — salesmen, partsmen, and mechanics. As originally proposed, the exemption applied only to selling and servicing automobiles, trucks, farm implements, and aircraft, but an amendment providing for the inclusion of trailers was adopted on the floor of the House. Thus it is plain that Congress intended to bring within the exemption *mechanics who performed the type of work on trailers that other mechanics performed on automobiles, trucks, farm implements, or aircraft.*" (Emphasis supplied.)

We are in accord with the Fourth Circuit's analysis of congressional intent.[10]

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[10]The holding in *Snell* that "duties as a truck driver, construction worker, and appliance serviceman" are not within the exemption accords with our holding here. We do not agree, however, that all get-ready work comes under the exemption. If the phrase modifies the type of mechanical work performed on trailers which is performed by other mechanics on automobiles, trucks, farm implements, or aircraft, such get-ready work is exempted.

Exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer, upon which the burden rests to show that it comes within the exemption. *Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392, 394, 80 S. Ct. 453, 456, 457 (1960); *Mitchell v. Kentucky Finance Company*, 359 U. S. 290, 295, 79 S. Ct. 756, 759 (1959); *Yogurt Masters, Inc. v. Goldberg*, 5 Cir., 1962, 310 F. 2d 53, 55. The record fails to show that appellee has met the burden of proving that the employees in question are "mechanics," within the restricted and commonly accepted sense which we deem Congress intended, who are primarily engaged in servicing trailers.

REVERSED and REMANDED for whatever wage adjustments are necessary in order to conform with this decision.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27956

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,
versus

LOUISIANA TRAILER SALES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 16, 1970)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 580

In the Supreme Court of the United States

OCTOBER TERM, 1970

LOUISIANA TRAILER SALES, INC., PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 539

LOUISIANA TRAILER SALES, INC., PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Secretary of Labor brought this action against petitioner under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin violations of the Act's overtime and recordkeeping requirements, and to restrain the continued withholding of unpaid overtime compensation due certain of its employees. Petitioner denied that the employees in question were subject to the overtime provisions of the Act, contending that such employees were within the overtime exemption provided by Section 13(b)(10) for a "mechanic primarily engaged in * * * servicing automobiles, trailers, trucks, farm implements, or aircraft."

Petitioner is engaged in the sale of new and used mobile homes. The employees in question are responsible for readying the mobile homes for delivery, delivering and setting them up at the customers' site, and performing repair and maintenance work thereafter. While these employees occasionally service and repair the running mechanisms used to move the homes on the highway (such as wheels, axles, brakes and signal lights), most of their time is spent in such tasks as constructing the concrete block foundations for installation of the homes at the customers' site; repairing appliances; connecting and servicing the plumbing, air conditioning, electrical and gas systems; carpentry work; and painting (A. 15–17).

The court below, after a full review of the legislative history of Section 13(b)(10) (Pet. App. 28–34)—including Congress' explicit rejection of the broad exemption for "servicemen" sought by the mobile home industry (Pet. App. 29 at n. 4)—concluded that "[t]o construe the word 'mechanic' in conjunction with the word 'trailer' as including the various house-repair, truck driver, and construction duties performed by these servicemen, is to frustrate the legislative intention and to extend the exemption beyond that" intended by Congress (Pet. App. 33). Noting that, in context, the phraseology of the exemption "has a vehicular connotation" (Pet. App. 28), the court held that the exemption for mechanics servicing trailers is limited to "mechanics who performed the type of work on trailers that other mechanics performed on automobiles, trucks, farm implements, or aircraft"

(Pet. App. 33). That interpretation, directly quoted from the only other appellate decision on this issue (*Swift v. Quality Mobile Home Brokers, Inc.*, 424 F.2d 288 (C.A. 4th)), comports with this Court's admonition that "exemptions are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Phillips Co. v. Walling*, 324 U.S. 490, 493.

The decision below is clearly correct and raises no issue of general importance warranting the attention of this Court.

It is therefore respectfully submitted that the petition of certiorari should be denied.

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SEPTEMBER 1970.